

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ADIAHA A. RUANE, :
Plaintiff. : 17-CV-03704 (PKC)
v. :
BANK OF AMERICA, NA, et al., : 225 Cadman Plaza East
Defendants. : Brooklyn, New York
: January 9, 2018

TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE PEGGY KUO
UNITED STATES CHIEF MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings began at 10:07 a.m.)

2 THE CLERK: The Honorable Magistrate Judge Peggy Kuo
3 presiding. Civil Cause for Initial Conference, docket number
4 17-CV-3704, Ruane v. Bank of America, NA, et al. Counsel,
5 please state your name for the record starting with the
6 plaintiff.

7 MS. WEISSMAN: Eve Weissman with New Economy
8 Project.

9 MR. BROMBERG: Brian Bromberg, Bromberg Law Office,
10 PC for the plaintiff. Good morning, Your Honor.

11 MR. DESPOTAKIS: Constantine Despotakis; Wilson
12 Elser, counsel for defendant Bank of America, NA. Good
13 morning, Judge.

14 MR. WAIT: Good morning, Your Honor. John Wait here
15 with my colleague Alexandra Sobol; Fox Rothschild. We
16 represent Chex Systems.

17 THE COURT: All right. Good morning, everyone. So
18 we're here for an initial conference but there's also been a
19 motion to strike the jury demand filed, and so I'll be asking
20 counsel some questions on that as we proceed. But I'd like to
21 hear what counsel have to say about the case since this is an
22 initial conference.

23 MS. WEISSMAN: Sure. Good morning, Your Honor.
24 This case is brought, plaintiff brings claims under two
25 federal laws, the Electronic Fund Transfer Act and the Fair

1 Credit Reporting Act, along with attendant state laws, the New
2 York Fair Credit Reporting Act, the New York General Business
3 Law Section 349 banning deceptive acts and practices and other
4 common law state law claims as well.

5 Your Honor, the plaintiff in this case is a low
6 income single mother who realized back in September 27, 2017 -
7 - I'm sorry, 2016, that there were funds in her Bank of
8 America checking account that she did not recognize. That
9 same day she promptly called the bank, informed them that
10 there were funds that were not hers and asked them to remove
11 the funds from her account. Instead, Bank of America called
12 her just a few hours later, informed her that they were
13 actually going to blame her for the fraud, close her account,
14 and also reported report suspected fraud activity to Chex
15 Systems, the other defendant in this case. It turns out that
16 the fraudulent funds or the unauthorized funds in her bank
17 account consisted of five checks. Those checks were some very
18 obvious signs of fraud including the fact that they were from
19 a Bank of America payroll account of a Cheesecake Factory
20 restaurant located Casablas [sic] Hills, California, a
21 location that our client had never lived in, worked at, or
22 even visited. The signature on the back of the check bears no
23 resemblance to her actual signature. And on the front of the
24 checks there is a signature that is actually a direct replica
25 of the signature of President Barack Obama.

1 After her account was closed she was unable to open
2 up an account at another bank. She tried and was unable to.
3 This prevented her from accessing her widow's pension which
4 comes from Ireland. And as a result of that, she was forced
5 to relocate from San Francisco where she had recently moved to
6 pursue a career opportunity to New York City at the age of 45
7 to move in with her mother and get back on her feet.

8 Your Honor, we're concerned that this has happened
9 to other Bank of America customers as well where the bank has
10 failed to conduct a reasonable investigation of their fraud
11 claims. We brought a case last year with some similar facts
12 against Bank of America where a low income consumer here in
13 New York City also had fraudulent checks deposited into his
14 bank account also bearing a fake Obama signature. So that's a
15 summary of our claims in our case.

16 THE COURT: All right. Can I just ask you a couple
17 of questions?

18 MS. WEISSMAN: Yes.

19 THE COURT: Your client opened a Bank of America
20 account in 2005 or when was that?

21 MS. WEISSMAN: Yeah, she doesn't remember the exact
22 date but based on the signature card, she does recognize her
23 signature and that date. She does not dispute that that was
24 around the time that she would have opened up the account here
25 in New York.

1 THE COURT: Okay. So is the signature card
2 something that she would have signed at the time that she
3 opened the account or is something that could have happened
4 later?

5 MS. WEISSMAN: Your Honor, I can't answer that
6 really because that might be a question for the bank. She
7 does recognize her signature since it did happen many years
8 ago. She doesn't disputed it is her signature but I don't
9 know that she recalls exactly whether she signed it in the
10 moment that she was opening the account.

11 THE COURT: Okay. All right. Thank you.

12 MS. WEISSMAN: Sure.

13 THE COURT: So let me hear -- can I hear first from
14 I guess Mr. Despotakis.

15 MR. DESPOTAKIS: Despotakis.

16 THE COURT: Yes. Despotakis, okay.

17 MR. DESPOTAKIS: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. DESPOTAKIS: The facts are, as you might
20 imagine, somewhat different from our point of view. There
21 were indeed five checks deposited into the plaintiff's
22 account. She protests that she knows nothing about it, was
23 not involved, and is positioning and presenting herself as a
24 victimized consumer presumably as part of some unknown hack of
25 her account with no evidence to back that up.

1 These checks were deposited and very quickly
2 bounced. The method of deposit was online banking. Well,
3 remote. Electronically imaged and deposited. So they were
4 not deposited with any teller or bank official who would have
5 seen it or inspected them. The reference to the signature of
6 the maker on the face of the check is really a scribble. They
7 are just initials. And this is an isolated event involving a
8 deposit into a particular customer's account. There's no
9 interconnection with anything. Once the check --

10 THE COURT: I'm sorry, when you say interconnection
11 with anything, what do you mean?

12 MR. DESPOTAKIS: With anything else. It's just a
13 single act arising out of an imaged remote deposit
14 electronically. No human eye at the bank saw these deposits
15 going into the account. They just were there.

16 THE COURT: Okay. Just so I understand, somebody
17 takes a picture and then it deposits or is it going through an
18 ATM machine?

19 MR. DESPOTAKIS: No, this is a remote, a picture and
20 we understand it was electronically deposited. I will verify
21 that, but it was electronic and that's how the checks wound
22 their way into the account.

23 THE COURT: Okay.

24 MR. DESPOTAKIS: They were very quickly upon
25 presentation, because the checks purport to be drawn on Bank

1 of America, it's an accelerated process. They find out that
2 these checks are not legitimate. So in wearing their hat now
3 as the payor bank of these checks in a different side of the
4 bank, they say no, these checks are no good, they're bounced
5 as counterfeits. That's counterfeit. And that's the way they
6 come back. These are spurious items that found their way into
7 this lady's account.

8 The most interesting thing, and I think you heard
9 counsel say, is it's rather odd that she's sitting on her
10 computer and online banking watching her balance just before
11 the day that all five checks appear. These checks are
12 bounced. The bank then, as allowed under the deposit
13 agreement, because the bank's deposit agreement governing the
14 terms of this account, contain a lot of provisions that might
15 certainly be used common sense but are there to prevent risk
16 of loss to the bank. In this case, the bank suffered no loss.
17 The plaintiff protests that these checks were not hers and she
18 has no claim to the money. The account was closed in a slight
19 overdrawn position but I don't think the bank pursued that.
20 At least I don't know that they did sitting here today. And
21 everything is even. They did report her because counterfeit
22 spurious items are coming out of the fraud world whether with
23 her involvement or knowledge, that remains to be seen, were
24 run through this account. So the bank didn't report it to say
25 look, you know, we're accusing this woman necessarily but

1 checks that are counterfeit found their way into this account.
2 How would anybody know what her account number was? How would
3 they know what to do? How would they know the timing to put
4 all five checks through together into her account? Now, there
5 are a lot of things that are going to be reserved for
6 discovery, but if you look at the signature on these checks,
7 it's a scribble, and the fact that no human eye saw them on
8 the intake side kind of makes some of the arguments on her
9 complaint rather red herrings. It doesn't matter. No human
10 eye saw these to inspect these checks. They weren't put in
11 over the counter. They just found their way by image.

12 So the bank did report it as it must and every
13 financial institution has an interest in knowing whether a
14 customer has allowed their account to be used for fraud
15 knowingly or unknowingly. That's the reason that Chex Systems
16 exists. It's basically a place where banks report look, we
17 had a customer, this customer and this account was used to
18 perpetrate a fraud by the deposit of counterfeit items or
19 spurious items and it's fair that the bank reported it and
20 it's fair that other institutions know about it because if
21 this customer goes and opens up an account at Bank B, they too
22 would like to know that perhaps she's not watching her
23 account, she's being negligent, or any customer. Or maybe
24 she's part of a fraud ring. We just don't know. But the
25 reporting was fair, it was reasonable, it's part of the risk

1 abatement and the risk loss prevention. And it's in the
2 deposit agreement. A customer knows what can happen.
3 Likewise, her account was not only frozen, it was also closed
4 out also as the agreement provides as a matter of contract.
5 But in New York law, as far as I know, there's no shotgun
6 marriage. The customer is not entitled to be able to bank
7 with Bank A and that bank is not entitled to have -- as long
8 as it's non-discriminatory, they don't have to have a business
9 relationship. It's still a deposit agreement. It's still a
10 relationship based on contract between a customer and their
11 financial institution. And each has rights. Each has rights.
12 And those rights are spelled out in the deposit agreement.

13 THE COURT: How long is that deposit agreement? How
14 many pages is it?

15 MR. DESPOTAKIS: You know, Your Honor, I brought an
16 extra copy which is a better copy, a better image. It's 30,
17 40 pages. It has a clear index in the front with the
18 categories bolded. Perhaps it's not when the exhibits came
19 through but it's bolded and it has a series of provisions in
20 here that relate to the deposit account relationship
21 including, as the Court is aware, the jury strike waiver
22 provision which is a mutual provision. Both the bank and the
23 depositor waive a right to trial by jury. It runs both ways.

24 THE COURT: All right. So let me ask you a couple
25 of questions. You said how would someone know how this

10

1 fraudulent -- I mean I don't think there's a dispute that this
2 is a fraudulent check.

3 MR. DESPOTAKIS: Oh, the checks are fraudulent.

4 THE COURT: It's clearly counterfeit, right? And so
5 you said how would anyone know how the checks got into the
6 system, right? What kind of investigation was done to find
7 that out?

8 MR. DESPOTAKIS: As I sit here today, Judge it was
9 reviewed by the bank's risk, fraud kind of risk unit. I don't
10 know what their formal title is. They looked at the checks.
11 They verified the spurious nature of those items and they
12 determined that the bank could not accept the risk of this
13 account continuing to be open, that a fraud had been
14 perpetrated by the mere fact that these checks ran through.
15 There were other aspects to that review. And again, as I sit
16 here today, I don't know all of those aspects but they are
17 there and there's a discrete file which we will be producing
18 in discovery and that's certainly not an issue. But just
19 Googling and going on the internet myself and talking to
20 people in general, there are frauds out there, as many as you
21 can shake a stick at.

22 THE COURT: Right. And I think everybody can -- I
23 guess I could take judicial notice that frauds occur, right?
24 But the question is who suffers the consequences. And I think
25 that's probably the issue here which is whether you did -

1 whether the bank did enough investigation to determine whether
2 the bank, the account holder was the one who should suffer
3 according to them by having the frozen account and the closing
4 of the account.

5 MR. DESPOTAKIS: Correct.

6 THE COURT: And granted, she has no right to it but
7 there are certain things that, you know, certain expectations,
8 whether you guys were out to really catch the bad guys if
9 they're not the plaintiff herself. So that's I guess the crux
10 of it.

11 MR. DESPOTAKIS: That's a great unknown if it's done
12 through --

13 THE COURT: Yes, I know, but I guess the question is
14 what is the burden on the bank to figure that out before
15 taking the action that it did? Right? I mean reporting that
16 it's fraud is clearly, yes, if somebody has an account where
17 fraudulent activity has occurred, figuring that out and
18 letting them know that in fact it is fraud is important. But
19 it sounds like here she, according to the plaintiff, reported
20 it herself. Are you saying that that's not true?

21 MR. DESPOTAKIS: She reported it but as I mentioned,
22 this will be part of the discovery.

23 THE COURT: Okay.

24 MR. DESPOTAKIS: It's kind of odd that by her own
25 version of events she was magically on the computer and

1 looking at her online banking.

2 THE COURT: I don't know that it's magical. People
3 check their accounts.

4 MR. DESPOTAKIS: Not all the time. Not the day
5 before these checks get --

6 THE COURT: Right. So that's -- I'm not --

7 MR. DESPOTAKIS: As far as --

8 THE COURT: Yes. I just want to figure out if you
9 have enough facts here for me to understand what happened.

10 MR. DESPOTAKIS: But if I may, Your Honor, as well,
11 two quick things in terms of the things that I've seen and the
12 scams I'm aware of. For example, there are fraudsters out
13 there who will reach out to people who are of modest means and
14 may need money and they'll say you're going to find some
15 checks and some money being deposited into your account. You
16 keep it. You keep 10 percent. Just don't say anything when
17 we withdraw it. And then you go and make a claim to the bank.
18 So these frauds and these kinds of frauds do exist out there.
19 And we'll find out in discovery, you know, who she
20 communicated with prior to these events, who she contacted,
21 who contacted her. I'm not saying she did or she didn't. But
22 these types of frauds also are out there.

23 THE COURT: Right. But the question here sounds
24 like is what the bank did at the time, whether they did an
25 adequate investigation.

1 MR. DESPOTAKIS: And again, Your Honor, we must keep
2 two things separate, if I may. The reporting to Chex Systems
3 about fraud events in this account. That's what it is, it's a
4 reporting of a fraud. The second piece of it is the bank's
5 absolute right to close an account because it doesn't have to
6 assume a risk of loss.

7 THE COURT: Okay. So --

8 MR. DESPOTAKIS: That's an absolute right.

9 THE COURT: Yes, I understand.

10 MR. DESPOTAKIS: That's our position.

11 THE COURT: Okay. But there are some let's say
12 contractual and perhaps statutory protections, right?

13 MR. DESPOTAKIS: And both ways too.

14 THE COURT: Okay. So let me find out -- I have a
15 few questions about your motion to strike the jury demand.
16 The first is the question that I posed to plaintiff's counsel
17 about the signature card. Can we assume that the date on the
18 signature card, May 31, 2005, is the date that she opened the
19 account with Bank of America?

20 MR. DESPOTAKIS: Yes, Your Honor. And that's also
21 stated in the accompanying supported affidavit.

22 THE COURT: All right. And so the account number
23 there ends in 52?

24 MR. DESPOTAKIS: Yes. We redacted that obviously
25 for confidentiality.

1 THE COURT: Yes. I appreciate that. But the letter
2 that you attached with regard to the account information and
3 the letter that was purportedly sent to her, that was dated
4 May 10, 2005 has an account number ending in 3211.

5 MR. DESPOTAKIS: I can take you through that, Your
6 Honor.

7 THE COURT: Okay.

8 MR. DESPOTAKIS: And that's explained in the reply
9 in more detail to our motion.

10 THE COURT: I didn't understand it.

11 MR. DESPOTAKIS: What happened when this account was
12 opened it was on the cusp in the transition period of the
13 acquisition of the former Fleet Bank by Bank of America. That
14 occurred in 2005 exactly in this time period.

15 THE COURT: Well, there was an effective date in
16 June 2005.

17 MR. DESPOTAKIS: That's correct.

18 THE COURT: Okay.

19 MR. DESPOTAKIS: That's correct.

20 THE COURT: So if she opened her account at the last
21 day of May and the acquisition was not effective until the
22 middle of June, are you saying that even though she opened an
23 account that ended in 52 it was changed to an account that
24 entered in 211?

25 MR. DESPOTAKIS: I know from my own account, Your

1 Honor, there was a renumbering done.

2 THE COURT: So it was renumbered?

3 MR. DESPOTAKIS: Yeah.

4 THE COURT: And do we have proof that that was
5 happened? Do we know that that's the same account because you
6 didn't --

7 MR. DESPOTAKIS: You know, I'm comfortable in saying
8 yes but I need to verify that. But from my own general
9 knowledge, I believe that is the case but I can't be 100
10 percent certain.

11 THE COURT: All right. And then the other problem
12 or the other thing that puzzled me is that the letter that was
13 purportedly sent to you said it was Bank of America letter
14 sent to Fleet customers was dated May 10, 2005 which would
15 have been before the plaintiff opened her account.

16 MR. DESPOTAKIS: Here's what -- that's correct, Your
17 Honor. However --

18 THE COURT: How does that work?

19 MR. DESPOTAKIS: -- this is [inaudible] of the
20 transition. So she eventually does open her account
21 admittedly at the later part of that month. So you have that
22 first letter. Here's what --

23 THE COURT: Who would the letter have gone to if --

24 MR. DESPOTAKIS: It would not have gone to her at
25 that point because she's not part of --

1 THE COURT: So when did it get to her?

2 MR. DESPOTAKIS: -- the Fleet customers. But by
3 being part of the Fleet customer base, our point in our papers
4 has clarified in the reply takes us down a certain --

5 THE COURT: I still don't understand. If she opened
6 her account with Bank of America, what does that have to do
7 with Fleet?

8 MR. DESPOTAKIS: Here's what I'm saying --

9 THE COURT: Right? If you're a -- if she's a bank -
10 - if she opened her account with Bank of America and Bank of
11 America acquired Fleet, why does her account change? She was
12 never with Fleet.

13 MR. DESPOTAKIS: It does not change, Your Honor.

14 THE COURT: Okay.

15 MR. DESPOTAKIS: It's an acquisition and merger.

16 THE COURT: Okay.

17 MR. DESPOTAKIS: Her account exists and carries
18 over. It's a handoff. It's an acquisition.

19 THE COURT: It's handed off from whom to whom?

20 MR. DESPOTAKIS: From Fleet to Bank of America.

21 THE COURT: But she was never with Fleet because she
22 never opened her account with Fleet.

23 MR. DESPOTAKIS: She had a Fleet account.

24 THE COURT: She had a Fleet account?

25 MR. DESPOTAKIS: I think she did.

1 THE COURT: When was that opened?

2 MR. DESPOTAKIS: Again, did she? I just want to
3 remember. But here's the analysis.

4 THE COURT: But why would she have a signature card
5 with Bank of America on May 31st?

6 MR. DESPOTAKIS: Then she may not have had a Fleet
7 account. But let me start -- if I may, Your Honor --

8 THE COURT: Well, but then I don't -- then if that's
9 not the case -- so this is why I'm puzzled because she either
10 was or wasn't a Fleet account.

11 MR. DESPOTAKIS: Let me think --

12 THE COURT: Let me ask you -- let me tell you why
13 I'm puzzled. Okay. If she was a Fleet customer, okay, then
14 she would have had -- then she may have gotten the letter that
15 was sent to Fleet customers in advance of this acquisition.

16 MR. DESPOTAKIS: If she was, if she was.

17 THE COURT: If she was.

18 MR. DESPOTAKIS: If she was.

19 THE COURT: And if she wasn't, then she wouldn't
20 have.

21 MR. DESPOTAKIS: Correct.

22 THE COURT: So it's important whether she was or
23 not. So the fact that you're having this conversation without
24 knowing that --

25 MR. DESPOTAKIS: No, because -- well, I understand

1 what Your Honor is saying but allow me a minute to take you
2 through the timeline in our argument.

3 THE COURT: Okay.

4 MR. DESPOTAKIS: Let's assume that that is correct
5 because I believe that you are correct. May 31 or so was when
6 she opens her account with Bank of America. Okay? That
7 signature card clearly references a deposit agreement and that
8 it's subject to an account rule, that there is a contract
9 between her and the bank. That's encapsulated in the deposit
10 agreement. And as time progresses, that's why the reply lays
11 this out, as time progresses each and every month she got a
12 monthly statement and in the monthly statement it directs her
13 attention again each and every month in boldface language of
14 the existence of a deposit agreement.

15 THE COURT: Can we stop there? Because I don't
16 really care about the deposit agreement at this point.

17 MR. DESPOTAKIS: Okay.

18 THE COURT: I care about the notifications in terms
19 of the jury, the jury demand strike.

20 MR. DESPOTAKIS: Well, that's what I'm saying, Your
21 Honor. That --

22 THE COURT: So no, because what you've relied on is
23 this letter that's dated May 10, 2005 that has an account
24 number that's different from the signature card and the
25 signature card is dated after the date of the letter that was

1 purportedly sent to her. So I don't understand whether she
2 got the letter because you told me she wouldn't have gotten
3 the letter if she wasn't a Fleet customer. And if she did get
4 the letter, why she was getting the letter with a different
5 account number. So I don't -- because that's sort of Exhibit
6 A of your argument because you're saying that there's an
7 argument there about settling disputes which says may elect to
8 have a jury or not. And then that's where the booklet is
9 enclosed. And let me see if the booklet is -- what is the
10 name of that booklet? Is that the deposit agreement?

11 MR. DESPOTAKIS: That's the deposit agreement.

12 THE COURT: Okay. So that's where the booklet is
13 enclosed. So I'm still having trouble with the timing as to
14 whether that May 10th mailing or that May 10th letter is
15 relevant at all because I don't know whether she got it.

16 MR. DESPOTAKIS: It may not be, Your Honor, but
17 we're saying --

18 THE COURT: If it's not relevant --

19 MR. DESPOTAKIS: Irrespective of that letter she was
20 --

21 THE COURT: Okay. But I want to talk about the
22 letter. So it's either --

23 MR. DESPOTAKIS: The letter would not have applied.
24 I will concede --

25 THE COURT: It's either -- in considering this

1 motion to strike the jury demand, I'm either considering that
2 letter or I'm not. And if you want me to consider the letter,
3 you --

4 MR. DESPOTAKIS: [Inaudible] --

5 THE COURT: You want me to throw the letter out?

6 MR. DESPOTAKIS: That letter we're prepared to say
7 she was not a Fleet customer, she opened her account. Then I
8 don't know of any other accounts except for that Fleet
9 account, Your Honor. Now if that account was 1132 -- here's
10 our point. And let me try to word it carefully because I know
11 what Your Honor is asking, I know what the issue. If she's a
12 Fleet customer, she knows that there is in existence an
13 account agreement, whatever that agreement might be. Putting
14 aside the May 10th letter that would not have given her an
15 actual copy of. What we're saying by signing that signature
16 card she's aware that an agreement between the bank and her
17 exists, right? For the prior account.

18 THE COURT: Okay. So --

19 MR. DESPOTAKIS: Now you transition to her opening
20 up the Bank of America account in the end of May. So again,
21 putting that May 10th letter on the shelf for purposes of the
22 analysis, the question becomes how is it that we, Bank of
23 America, are saying she is now contractually bound by that
24 jury strike provision.

25 THE COURT: Okay.

1 MR. DESPOTAKIS: And we're saying that binding
2 effect comes with cost in a couple of ways. Her ongoing
3 knowledge that there is a deposit agreement that's applicable.
4 The signature card of 2005 that she did sign at the end of May
5 refers to the deposit agreement and any amendments to it from
6 time to time.

7 THE COURT: Okay. So let me turn --

8 MR. DESPOTAKIS: Then you layer on the monthly
9 statements that again give her notice of that deposit
10 agreement. It's easy access and availability to look at, to
11 ask for, to review year in and year out since that 2005 till
12 the date of this series of events in 2016.

13 THE COURT: Okay. So let me look at this signature
14 card. And it says by signing this application I agree that
15 everything is true, agree to notify you any time if anything
16 changes. I agree to be bound by the terms and conditions in
17 deposit accounts and services for which I've applied. Okay.
18 So where does it show that she received the deposit agreement?

19 MR. DESPOTAKIS: Are you looking at the May 31 card,
20 Your Honor?

21 THE COURT: Yes.

22 MR. DESPOTAKIS: Okay.

23 THE COURT: And this is your attachment.

24 MR. DESPOTAKIS: Right, but the --

25 THE COURT: Exhibit A.

1 MR. DESPOTAKIS: The deposit agreement as it exists
2 from time to time --

3 THE COURT: I know, but where does it say that she
4 received it?

5 MR. DESPOTAKIS: It would not say that she received
6 it. Just an acknowledgment that she knows it exists. She
7 agrees to it.

8 THE COURT: She knows it exists?

9 MR. DESPOTAKIS: She agrees to it.

10 THE COURT: Agrees to what? This doesn't make
11 reference to a deposit agreement document.

12 MR. DESPOTAKIS: But then that notice is given again
13 and again.

14 THE COURT: No, no, but I'm trying to figure out at
15 the moment she signs it -- I'm just trying to figure out at
16 what point she's on notice of that document, that 40 page
17 document you showed me. So at what point is she on notice of
18 that?

19 MR. DESPOTAKIS: I would argue --

20 THE COURT: Because this document, the signature
21 card, does not make reference to that document.

22 MR. DESPOTAKIS: Not by name, not by the title of
23 the deposit agreement.

24 THE COURT: Right. So how is somebody supposed to
25 know that that's the document that they've agreed to?

1 MR. DESPOTAKIS: By the notice she then gets each
2 and every month. And our legal position is she knows there's
3 an agreement --

4 THE COURT: And so what proof do you have that she's
5 receiving that every month?

6 MR. DESPOTAKIS: The monthly statements are
7 addressed to her.

8 THE COURT: The monthly --

9 MR. DESPOTAKIS: There's no debate that she didn't
10 get her monthly bank statements.

11 THE COURT: Yes, but the monthly statement doesn't
12 show that she received the deposit agreement.

13 MR. DESPOTAKIS: It notifies her again and again --

14 THE COURT: That there -- of what?

15 MR. DESPOTAKIS: -- of the deposit agreement and
16 [inaudible] --

17 THE COURT: Where is the deposit agreement?

18 MR. DESPOTAKIS: It's for the asking.

19 THE COURT: Where can she find it?

20 MR. DESPOTAKIS: Online on the bank's website, from
21 any branch, from any bank --

22 THE COURT: But does the document say you must look
23 at this document because this document waives one of your
24 constitutional rights? Does it say --

25 MR. DESPOTAKIS: With all due respect, Your Honor,

1 we don't believe that is the law.

2 THE COURT: Okay. But I'm just trying to figure out
3 where there's notification of the document that states that
4 think that you're -- the jury waiver. What document? Because
5 this document you've told me doesn't make reference to the
6 deposit agreement. It makes reference generally to documents
7 and agreements.

8 MR. DESPOTAKIS: To an agreement with the bank that
9 she could have gone and asked for and gotten.

10 THE COURT: So she has to ask for it. It's not
11 being given to her.

12 MR. DESPOTAKIS: She would have been given something
13 --

14 THE COURT: But it doesn't say that.

15 MR. DESPOTAKIS: -- presumably when she opened the
16 account.

17 THE COURT: It doesn't -- that's what I'm trying to
18 figure out. Where does it say that she received it?

19 MR. DESPOTAKIS: And again, that would have been the
20 signature card signed at the time. Again, it was a transition
21 from Fleet to Bank of America.

22 THE COURT: Okay. So but this --

23 MR. DESPOTAKIS: Those signature cards were changed
24 later, you know, as new accounts --

25 THE COURT: Just to be clear because the print is

1 small, so there's nothing here that makes reference to the
2 deposit agreement that you are referencing, is that right?

3 MR. DESPOTAKIS: Not by title of the document.

4 THE COURT: Not by title. But tell me where you're
5 saying.

6 MR. DESPOTAKIS: If you're looking at Exhibit A,
7 Judge --

8 THE COURT: Exhibit A.

9 MR. DESPOTAKIS: And again, I apologize, it's a poor
10 copy --

11 THE COURT: Yes.

12 MR. DESPOTAKIS: -- when it was reproduced but it's
13 --

14 THE COURT: And my eyesight is not what it used to
15 be, so please tell me where I should be looking.

16 MR. DESPOTAKIS: It would be that line, "I agree to
17 be bound by the --" it looks like "terms and conditions for
18 this deposit account and services and credit accounts." I'm
19 just trying to read some of the language myself. It talks
20 about her agreeing to be bound to the agreements for deposit
21 accounts. But I agree with Your Honor it does not
22 specifically refer to this document as titled.

23 THE COURT: Okay. But it says -- so you're saying
24 this statement which I'm assuming is what it is because it's
25 not very legible and I don't have the original so I don't know

1 whether her version was legible, it says, "I agree to be bound
2 by the terms and conditions governing the deposition accounts
3 and services and credit accounts for which I have applied."

4 MR. DESPOTAKIS: Right.

5 THE COURT: That's what you're relying on.

6 MR. DESPOTAKIS: Right.

7 THE COURT: Okay.

8 MR. DESPOTAKIS: And our point is that that tells
9 her there's an agreement.

10 THE COURT: Okay.

11 MR. DESPOTAKIS: Something she should be asking for.
12 This was a pamphlet form if I remember correctly. Again, I'm
13 going back now, Your Honor, from my own memory. I was in-
14 house counsel for Nat West for some 20 years before the
15 acquisition. These used to be pamphlets which is a strange
16 way to copy you can see. But this was a --

17 THE COURT: So there's a document that you attached
18 in your document Exhibit B, and it was the May 10th letter
19 which are now telling me I should not rely on.

20 MR. DESPOTAKIS: Right, since she was not an account
21 party --

22 THE COURT: Okay. But --

23 MR. DESPOTAKIS: -- she would not have gotten that
24 letter.

25 THE COURT: So the document that is attached to that

1 which is Document 15-2 as docketed, it says deposit agreements
2 and disclosures, and it says effective June 17, 2005. Is that
3 the deposit agreement that you're talking about?

4 MR. DESPOTAKIS: Beginning with that date, Your
5 Honor. And also as referred to on each and every monthly
6 statement.

7 THE COURT: Each and every month. Okay. So --

8 MR. DESPOTAKIS: Under the heading important notice.

9 THE COURT: This document which says effective June
10 17, 2005, has a table of contents as you mentioned. It does
11 not seem to be a complete table of contents because it stops
12 at Page 70 and the purported jury waiver that's in the section
13 called resolving disputes --

14 MR. DESPOTAKIS: It's resolving --

15 THE COURT: -- doesn't even show up on that table of
16 contents as you've given the Court. I assume it's there but
17 you haven't given it to me. And then it doesn't tell me how
18 long the pamphlet actually is because it stops at Page 81 but
19 there's nothing that tells me that that is in fact the last
20 page. So --

21 MR. DESPOTAKIS: Yeah, that --

22 THE COURT: Can you tell me how many pages that
23 document was in 2005?

24 MR. DESPOTAKIS: In 2005?

25 THE COURT: Because you've asked the --

1 MR. DESPOTAKIS: Beyond what we were able to get
2 from the bank that --

3 THE COURT: Yes, because you've asked me to rely on
4 this document so I'm --

5 MR. DESPOTAKIS: But that --

6 THE COURT: I'd like to know how long the document
7 was.

8 MR. DESPOTAKIS: That document, Your Honor, remember
9 this is 2005.

10 THE COURT: Yes.

11 MR. DESPOTAKIS: This event happens in 2016.

12 THE COURT: I know, but you're relying on it.

13 You're relying on the deposit agreement.

14 MR. DESPOTAKIS: We're relying on that deposit
15 agreement and each successive year's deposit agreement.

16 THE COURT: Okay. So do you have copies of those?

17 MR. DESPOTAKIS: They were added. They're on the
18 reply papers, Your Honor. They were Exhibit B, Part 1 of 4.
19 There were four parts to B. And those are deposit agreements
20 down through the years.

21 THE COURT: This is --

22 MR. DESPOTAKIS: Which I believe was part of our
23 reply. And the purpose -- not to burden the Court, but the
24 purpose for attaching all of the deposit --

25 THE COURT: How many pages were those documents?

1 MR. DESPOTAKIS: Let me pull one out as a
2 representative sample. I'll just randomly go to Part 3 of 4.
3 This too was in a paper form, looking at Part 3 of 4 and
4 looking at the table of contents it has the same thing
5 resolving claims. Let me go to the end of this. It may very
6 well be, Your Honor, not seeing an actual copy of it and I
7 can't tell from this, the resolving claims provision is I
8 believe pretty much towards the end of the agreement, but not
9 having the actual exemplar that I could look through I can't
10 make a representation to the Court one way or the other.

11 THE COURT: Okay. So I'm pulling it up on the
12 docket so I can take a look because you've had -- Exhibit B
13 appears to be several pages. Okay. That's why my law clerk
14 didn't print it up for me because it's so many pages.

15 MR. DESPOTAKIS: On the representative sample, yeah,
16 then we go -- it ends with jurisdiction and venue, Page 48.

17 THE COURT: And how many versions did you attach
18 there? There's one now that's 2008.

19 MR. DESPOTAKIS: We tried to give the Court
20 everything since 2005 to date. And the Court will note that -
21 -

22 THE COURT: Well, to date? Because the document
23 that you gave in your initial pleadings was 2017 which clearly
24 the plaintiff would not have received.

25 MR. DESPOTAKIS: That would have been the current

1 one to show the Court the provision.

2 THE COURT: Right. But the current doesn't matter
3 because we're talking about her agreement.

4 MR. DESPOTAKIS: Right.

5 THE COURT: All right. So --

6 MR. DESPOTAKIS: The account was not there, so --

7 THE COURT: How many versions would she have gotten?

8 MR. DESPOTAKIS: She would have -- these would have
9 been in place. If the Court looks to the effective date on
10 the lower left front page --

11 THE COURT: Of what document?

12 MR. DESPOTAKIS: Of each one of these agreements
13 over time. For example, this one says November -- here's one
14 2016, another one would say effective -- just bear with me.
15 And they're identified, Your Honor, in a little bit more
16 detail in the reply affidavit.

17 THE COURT: Yes. But having all of this here like
18 this in hundreds of pages for the Court is not useful because
19 I can't go through every page and figure out how many versions
20 there were. It would have been useful if you told me how many
21 versions and what the effective dates were.

22 MR. DESPOTAKIS: This provision would have been
23 unchanged through the years.

24 THE COURT: But you're telling me that there were
25 different iterations of the, what is it called, deposit

1 agreement.

2 MR. DESPOTAKIS: Deposit agreement. But not in this
3 provision, Judge. It's just that --

4 THE COURT: Well, but still in order to find out if
5 it was kept the same an individual would have to read it. Are
6 you saying that --

7 MR. DESPOTAKIS: I'm saying once they read it the
8 first time, and then they'd be notified --

9 THE COURT: Well, but it's changed.

10 MR. DESPOTAKIS: -- once it changes --

11 THE COURT: But it's been changed. The document
12 which you're saying was the customer's obligation to read
13 would have changed several times between 2005 and 2016.

14 MR. DESPOTAKIS: But this provision would not have
15 changed.

16 THE COURT: I know, but you don't know that unless
17 you read the whole document. And if you're saying the
18 customer would have to read the whole document, I'm trying to
19 figure out how many pages the customer would have had to read
20 to figure this out.

21 MR. DESPOTAKIS: What we're saying is it was legally
22 incumbent on the customer to look and --

23 THE COURT: Yes, that's right. That's why I'm going
24 through this exercise.

25 MR. DESPOTAKIS: Each time it was --

1 THE COURT: So I'm trying to figure out how many
2 pages you're saying this customer would have had to read
3 throughout the years between 2005 and 2016.

4 MR. DESPOTAKIS: I would suggest two, the table of
5 contents and going to that section about resolving disputes
6 and the waiver of the jury trial.

7 THE COURT: Oh.

8 MR. DESPOTAKIS: Which is mutual.

9 THE COURT: That's interesting. Okay. That's fine.
10 That's --

11 MR. DESPOTAKIS: Because there are many provisions
12 in this agreement.

13 THE COURT: Yes. I know that. But I'm just trying
14 to get a sense of what you're saying. So do you have at hand
15 all those agreements and can you tell me how many there were
16 between 2005 and 2016? This would save my law clerk some time
17 in having to go through all the pages that are on the docket.
18 Because they would just be pamphlets, right? So tell me how
19 many pamphlets there are.

20 MR. DESPOTAKIS: We printed them out, so let me see
21 what I can make of this.

22 THE COURT: And how many pages each one is.

23 MR. DESPOTAKIS: What's been marked as Exhibit B,
24 Part 1 of 4 should have -- here we go. It says Part 1 of 4.
25 This one would have 48 pages promulgated in 2005, effective

1 date of it appears to be 11/05. I'm looking at the very
2 bottom. I go to the next one. These may be out of order.
3 There was one effective June 17, 2005. This one likewise
4 based on the table of contents was 70 pages.

5 THE COURT: Well hold on. If that was 70 pages,
6 then the portion that you attached in your pleadings reference
7 shows the resolving disputes on Pages 80 and 81.

8 MR. DESPOTAKIS: The positioning of this may have
9 changed over the years.

10 THE COURT: No, no, that's the actual document.
11 That's the one that's effective June 17th, '05.

12 MR. DESPOTAKIS: Yeah, but this one is 48. I'm
13 sorry, the one for [inaudible] --

14 THE COURT: Can I --

15 MR. DESPOTAKIS: And it talks about resolving
16 claims.

17 THE COURT: No. I see resolving disputes. Can you
18 just look at your pleadings, Document 15-2, Page 10 of 11, the
19 portion you gave me which purports to be a page from the
20 deposit agreement effective June 17, 2005. Even though the
21 table of contents ends at 70, the pages talking about
22 resolving disputes are actually Pages 80 and 81.

23 MR. DESPOTAKIS: You're talking about the motion in
24 chief, Your Honor?

25 THE COURT: Yes.

1 MR. DESPOTAKIS: In that early version, yes, you are
2 correct.

3 THE COURT: So how can that document only have 70
4 pages?

5 MR. DESPOTAKIS: No, this is 80 and 81. And I
6 apologize, Your Honor. It's possible some of these are
7 incomplete. But again, the relevant provisions are here in
8 the copies you have before you.

9 THE COURT: Yes, but I can't -- I don't -- now I
10 don't know whether I can say that this provision that you've
11 attached to your pleading in chief was actually part of the
12 deposit agreement if the deposit agreement ends at Page 70 and
13 you've given me Pages 80 and 81.

14 MR. DESPOTAKIS: If you look at -- let's see. The
15 first one. Then you've got this -- let me go to the June 2005
16 agreement, and I'm going to look at that one.

17 THE COURT: That's the one I'm looking at.

18 MR. DESPOTAKIS: That's Exhibit B, correct? This is
19 the one we were discussing a moment ago, and it has resolving
20 disputes. And this is a 70-page agreement. We have -- if I
21 go to the next exhibit --

22 THE COURT: Is resolving disputes on Page 80?

23 MR. DESPOTAKIS: I'm looking at the table of
24 contents. Page 80, correct.

25 THE COURT: Okay. So how can it be a 70-page

1 document if you're giving me Page 80?

2 MR. DESPOTAKIS: It changes over time, Your Honor.

3 THE COURT: No, we're talking about the one
4 document, the document that's effective June 17, 2005. It
5 should be a static document. And you've told me it's a 70-
6 page document and yet the part you want me to look at is on
7 Page 80.

8 MR. DESPOTAKIS: This one, this particular year,
9 that particular iteration, that's where it appears, Page 80,
10 correct.

11 THE COURT: Right. But you said the documents ends
12 at 70.

13 MR. DESPOTAKIS: I'm looking at incomplete copies of
14 it.

15 THE COURT: Then what you've given me as exhibits
16 are not reliable.

17 MR. DESPOTAKIS: But not as to the relevant
18 provision.

19 THE COURT: But the relevant provision, if it's on
20 Page 80 and it's a 70-page document isn't part of the
21 document. It's outside of the document. That's the part that
22 I don't understand.

23 MR. DESPOTAKIS: But these are the documents that
24 are attached in our reply papers.

25 THE COURT: I know. But you've told me -- I've

1 given you the opportunity because I was looking at what you
2 gave in your affidavit -- not your affidavit, but the
3 affidavit from the initial pleading. Okay? And I had a
4 question about it. And so now you're going to the reply
5 affidavit and you're still giving me the same information
6 which is that it's a 70-page document and yet the provision
7 you want me to look at is on Page 80. So I don't understand
8 that. I'm just trying to understand it.

9 MR. DESPOTAKIS: Because the document itself would
10 have been reprinted over time. Different issues were inserted
11 into the deposit agreement having nothing to do with jury
12 waiver.

13 THE COURT: No, but the jury waiver provision is on
14 Page 80. Can I give this to you? You know what I'm talking
15 about, right?

16 MR. DESPOTAKIS: I understand, Your Honor. Yes.

17 THE COURT: So how can it be on Page 80 if the
18 document ends at 70? That just seems weird.

19 MR. DESPOTAKIS: It might be an incomplete document
20 or an earlier iteration. But we gave you --

21 THE COURT: But how am I supposed to rely on it if
22 it's incomplete and changing? I don't understand how I can do
23 that from a logical perspective.

24 MR. DESPOTAKIS: Because as you go through from 2005
25 --

1 THE COURT: No, no, I'm just looking at the one
2 document. I'm just -- I know things change over time and I
3 appreciate that argument. So that's why I wanted to start
4 from the very beginning. Right? That's a very good place to
5 start.

6 MR. DESPOTAKIS: Always is.

7 THE COURT: Right. And so the first document,
8 because it was when Bank of America took over Fleet, and you
9 made reference to it in both your initial papers and your
10 reply papers, is the document that says effective June 17,
11 2005 and it's called deposit agreements and disclosures.
12 Okay. So that's great. And I'm looking at it because you
13 want me to rely on it. And the table of contents that I have
14 ends at 70. And so my question was maybe that's incomplete.
15 That's okay. But I'm giving you the opportunity to tell me
16 what, since you do have the complete version there, what this
17 document is like because you've only given me excerpts and the
18 excerpt you draw my attention to called resolving disputes is
19 in Page 80 and 81. So is that or is that not a part of the
20 document?

21 MR. DESPOTAKIS: If Your Honor --

22 THE COURT: And what you're telling me doesn't give
23 me any comfort.

24 MR. DESPOTAKIS: If Your Honor is referencing the
25 document I was referring to as a sample -- this is a March 16

1 -- I'm sorry, March 2016 --

2 THE COURT: No, no, no.

3 MR. DESPOTAKIS: You're talking about --

4 THE COURT: I'm still talking about 2005 because
5 like I said, we start at the very beginning. We haven't
6 progressed from there, so that's why I'm still stuck on that
7 because somehow you want me to look at Page 80 but the
8 document ends at 70 and that's kind of an Alice in Wonderland
9 situation because I'm like what Page 80? Is that even part of
10 the document you want me to look at? I'm not saying you're
11 wrong. I'm looking for an explanation. If you have the
12 document and you want to hand it up and I can look at it, I
13 will certainly look at it, but I'm not hearing anything that
14 helps.

15 MR. DESPOTAKIS: Other than the documents that are
16 in the reply that are a sequence of deposit agreements
17 [inaudible], the best way I can respond to Your Honor is
18 simply that this provision is there. It's there in all of
19 these exhibits over the many years.

20 THE COURT: Okay. And --

21 MR. DESPOTAKIS: As is the notice on the monthly
22 statement.

23 THE COURT: Okay. And the notice on the monthly
24 statement says you are bound by the agreement.

25 MR. DESPOTAKIS: Yes.

1 THE COURT: Okay. But it doesn't --

2 MR. DESPOTAKIS: It says important --

3 THE COURT: Because -- and the reason I ask is
4 because I live in the real world. When the credit card
5 companies change their agreements they often enclose a
6 pamphlet and I know that I've gotten it and I'm sure that they
7 have a record that they sent it to me. So I was just curious
8 whether Bank of America sent a copy of the agreement every
9 time there was a revision so that the customer knows here's a
10 new version if you want to read it because you're bound by it
11 and continue to be bound by it notwithstanding there may have
12 been changes. Here's a copy of it. Now, if they didn't do
13 that, that's the practice. But I need to understand what
14 you're relying on in your argument that this plaintiff was on
15 notice and what that meant.

16 MR. DESPOTAKIS: I think once having been given
17 notice that there was an agreement and --

18 THE COURT: Somewhere.

19 MR. DESPOTAKIS: -- it's going to be from time to
20 time --

21 THE COURT: An agreement somewhere. It's not that
22 she was given the agreement. You're saying she wasn't given
23 the agreement at the signature card time. There's no record
24 that she was.

25 MR. DESPOTAKIS: Going back to 2005 I have nothing

1 in front of me and nothing that the bank could verify whether
2 the practice then was to give people the pamphlet. So I can't
3 tell you, Your Honor, that that was the practice.

4 THE COURT: Okay.

5 MR. DESPOTAKIS: I can tell you my own experience
6 because I was a customer too -- well, that's neither here nor
7 there for your purposes and I won't go there for purposes of t
8 his argument. But what we're saying is under the applicable
9 law she's on notice that there's an agreement. That notice
10 appears seriatum over and over on each and every one of the
11 monthly statements, important notice, big uppercase letters.
12 It appears in each of these iterations.

13 THE COURT: Important notice shows up under
14 statement that says --

15 MR. DESPOTAKIS: On the statement as well.

16 THE COURT: Do you have an example of the statement
17 --

18 MR. DESPOTAKIS: That is --

19 THE COURT: -- that shows me what that looks like?

20 MR. DESPOTAKIS: Yes, I do indeed. Here's a sample.
21 It's actually the statement leading up to the month of these
22 transactions.

23 THE COURT: And was that submitted previously so I
24 can look at it or is it something you --

25 MR. DESPOTAKIS: I don't know that we submitted --

1 no, we would not have had -- maybe it's part of the reply but
2 I don't think so. It was discussed in the reply affidavit so
3 it may very well be there.

4 THE COURT: Okay.

5 MR. DESPOTAKIS: Let me try to find that. In his
6 reply he mentions it specifically. And you can read the
7 notice in the record while I search for the affidavit, Your
8 Honor. Important information all boldfaced upper case bank
9 deposit accounts. Deposit agreement. When you opened your
10 account you received a deposit agreement and fee schedule and
11 agreed that your account would be governed by the terms of
12 these documents as we may amend them from time to time. These
13 documents are part of a contract to your deposit account and
14 govern all transactions relating to your account including all
15 deposits and withdrawals. Copies of both the deposit
16 agreement and fee schedule which contain the current version
17 of the terms and conditions of your account relationship may
18 be obtained at our financial centers. And this is Page 2
19 important information. And this is discussed in the reply
20 affidavit, Your Honor.

21 THE COURT: All right. But a copy was not attached?

22 MR. DESPOTAKIS: I have to see if there is one.

23 THE COURT: All right. But you've read it into the
24 record so that's fine. But you're saying that it says you
25 received a copy of the deposit agreement --

1 MR. DESPOTAKIS: At the time you opened --

2 THE COURT: -- at the time you opened the account
3 but actually we have no record of that, right? Because if she
4 opened the account at the time of the signature card, there's
5 nothing that's attached to the opening documents that show
6 that she did get it.

7 MR. DESPOTAKIS: This would be a fair inference of
8 this reading. This will be that that was the bank's practice.

9 THE COURT: That was the practice but there's no
10 record that this person actually received it.

11 MR. DESPOTAKIS: On personal experience, but --

12 THE COURT: Right. But you know, usually if you get
13 documents you can say I signed for it and I received it but
14 that purports to say you did receive it but in fact we have no
15 record on this record.

16 MR. DESPOTAKIS: And it invites them to look at it.
17 And this appears, this prominent notice appears on each and
18 every copy of the statement. And here it is on a simple
19 couple of page monthly statement [inaudible].

20 THE COURT: Saying that you have to go to this
21 document. You have to go to the bank and ask because it
22 doesn't even say that you can get it on a website. You have
23 to go to the bank and ask for it.

24 MR. DESPOTAKIS: For those that I think had online
25 banking there's also all kinds of facilities. She had online

1 banking so she could navigate and get it.

2 THE COURT: But you don't have a screenshot of what
3 an online bank customer would see. But that piece of paper
4 says you must go to the bank and ask for it.

5 MR. DESPOTAKIS: This piece of paper says it. It
6 says it's available. And that's really what we're saying as a
7 matter of law. It's available, you're bound by it, here it
8 is. And this notice appeared over and over and over and over
9 each monthly statement she got over the years.

10 THE COURT: All right. Okay. So thank you. Now is
11 there anything else you want to say?

12 MR. DESPOTAKIS: No.

13 THE COURT: Thanks. So let me turn to counsel for
14 Chex. Tell me what you want to say.

15 MR. WAIT: Good morning, Your Honor. John Wait on
16 behalf of Chex.

17 The allegations -- as Your Honor knows, Chex is a
18 reporting agency. We receive information from banks such as
19 Bank of America in the event that the consumer later disputes
20 the accuracy of the information. We typically go back to Bank
21 of America and conduct an investigation. We ask for a
22 verification of the underlying information, et cetera. The
23 allegation against Chex primarily, according to the plaintiff,
24 is that Chex reinvestigation was not adequate or reasonable.
25 In essence, that Chex should have done more than it did to

1 determine the veracity of the underlying allegations.

2 We will need to -- we have currently an
3 investigative file which we have gone through which we will be
4 producing in discovery but we are going to need to conduct
5 interviews and dive deeper into what actually happened here
6 before we can really get to the heart of some of these issues
7 here whether or not in fact this was an innocent plaintiff,
8 whether or not all the allegations were false, et cetera. And
9 other than that, I have nothing further to add.

10 THE COURT: So you have the investigative file but
11 you don't know yet what the extent of the investigation was?

12 MR. WAIT: It's notes and we're going to need to
13 actually sit down and interview those people to find out more
14 about --

15 THE COURT: Find out what happened.

16 MR. WAIT: -- what exactly they did. I mean
17 certainly you can glean some of that from the notes themselves
18 which I think is your point, but I don't think that is
19 comprehensive enough. I think we're going to need to do some
20 discovery.

21 THE COURT: Well, yes. I understand discovery needs
22 to proceed but I guess my question is from the time this case
23 was filed and then in preparation for your answer and
24 everything else until today, are you saying you still don't
25 know the extent of the investigation? Because you're not

1 going to find out more from discovery propounded on the
2 plaintiffs, the extent of your investigation. So I'm just
3 trying to find out what you mean by that.

4 MR. WAIT: No. I mean our investigation is
5 certainly detailed in the investigative notes and that's the
6 whole point of having investigative notes. So you are
7 correct. All I'm saying is that as we've heard this morning,
8 you know, there are two different possible scenarios here in
9 terms of what happened. You know, again, in terms of whether
10 or not this plaintiff was completely innocent or not in terms
11 of whether or not the investigations were adequate or not. We
12 certainly have some of information. We have certainly
13 reviewed the file carefully but we're far from the point where
14 we can definitively say what happened here.

15 THE COURT: Okay.

16 MR. DESPOTAKIS: If I may, Your Honor, may I
17 supplement?

18 THE COURT: Yes. Okay.

19 MR. DESPOTAKIS: It's going to be very quickly.

20 THE COURT: Go ahead.

21 MR. DESPOTAKIS: Just for the record, the
22 notification that I read coming from the monthly statements
23 are indeed discussed in the reply affidavit and they are
24 exhibits that were also submitted to the Court. All the
25 monthly statements are Exhibit D for David. The jury waiver

1 provisions are again repeated as Exhibit C. So that reply
2 affidavit of Tom R. Jordan does take the Court exactly through
3 the sequence of monthly statements and they are attached to
4 the motion.

5 THE COURT: So Exhibit D is a monthly statement.
6 I'm just looking at the first one that you attached and that
7 is Page 1 of 11 for the period July 14th, '05 to August 15th,
8 '05. I'm scrolling through the statement which for privacy
9 reasons I see you've blacked out the details.

10 MR. DESPOTAKIS: If I may, Your Honor, also Mr.
11 Jordan's affidavit parses out the timelines for the Court. He
12 says from at least the August 15, 2005 statement, the monthly
13 statement for the period May 15, 2013 through June '13, this
14 notice was printed on the last page of the monthly statements
15 under a heading that reads, quote, uppercase, "Important
16 information for bank deposit accounts."

17 THE COURT: Okay. So let me -- I'm just looking at
18 this page because I want to see that.

19 MR. DESPOTAKIS: Well then he says, Your Honor, my
20 point being beginning with the monthly statement for the
21 period of June 13, 2013, this notice was moved from that year
22 going forward for the second page of the monthly statements.
23 So from mid-2013 statement rendering --

24 THE COURT: Right. So --

25 MR. DESPOTAKIS: -- that logo now appeared on the

1 second page.

2 THE COURT: I'm looking at your Exhibit D and this
3 is, like I said, a statement from July 14, 2005 through August
4 15, 2005 to the plaintiff. Can you direct me to the page
5 where this notice appears because I'm not seeing it?

6 MR. DESPOTAKIS: July '05? July '05, Your Honor?

7 Beginning with the monthly statements for the period -- let me
8 find --

9 THE COURT: Yes, this is in 2005. So it's your
10 first Exhibit D, Page 1.

11 MR. DESPOTAKIS: It would be -- I don't have Exhibit
12 D with me but looking at the timelines he describes, it should
13 be the second page after the cover page that has the
14 customer's address. Then you just go to the next page.

15 THE COURT: I don't see it. I see Page 2 of 11,
16 sign up for direct deposit, more rewards, more choices, more
17 for you. Get your statement online through online banking.
18 Moving. And risk free CD/IRA.

19 MS. WEISSMAN: Your Honor, the statement appears to
20 be on Page 11 of that first deposit agreement.

21 THE COURT: Okay.

22 MR. DESPOTAKIS: The first one. And then it was
23 moved up in positioning --

24 THE COURT: Okay. But I'm just not seeing it, so
25 let me see. Page 11 of 11, how to balance your Bank of

1 America account. Important information. I see it.

2 MR. DESPOTAKIS: And the positioning of that notice
3 was moved up to the second page.

4 THE COURT: Right because wow, that's -- unlike the
5 boxes on Page 2, this one is at the bottom of the piece of
6 paper that says how to balance your bank account, the
7 important information is at the end. Okay. So now you're
8 saying in 2013 it's moved up.

9 MR. DESPOTAKIS: It moved up to the second page.

10 THE COURT: Okay. So let me see that.

11 MR. DESPOTAKIS: Such as the statement that I read
12 from, Your Honor, which was, for example, the statement from
13 September of 2016.

14 THE COURT: So I'm looking at -- you said 2016 it
15 was moved up or 2013.

16 MR. DESPOTAKIS: September, '16 is the one I read --

17 THE COURT: '16. Okay. All right.

18 MR. DESPOTAKIS: -- before but it's the same notice.

19 THE COURT: So '13 is still at the end and '16 when
20 it's moved up in the copy that you've given me now has it in
21 red letters.

22 MR. DESPOTAKIS: Looking at the March 16th to April
23 13th statement, once again it's on the second page. It moved
24 up.

25 THE COURT: Yes. I actually see it moved up as of

1 this one which is dated July 15, or July 2013. It's already
2 on the second page.

3 MR. DESPOTAKIS: It's already up, yes.

4 THE COURT: Okay. Thank you.

5 MR. DESPOTAKIS: Thank you.

6 THE COURT: So let's turn to --

7 MS. WEISSMAN: Your Honor, may I just add something

8 --

9 THE COURT: Go ahead, please.

10 MS. WEISSMAN: -- about the deposit agreements. I
11 just wanted to point out that in addition to the issues you've
12 raised, there's no evidence that any of the exhibits attached
13 to the affidavit of Tom Jordan were ever sent to or presented
14 to our client.

15 THE COURT: Well, I think that's been conceded. I
16 think the point is that the argument is she had the
17 opportunity to get those documents. I don't think anyone is
18 saying that she was actually sent those documents.

19 MS. WEISSMAN: And I just wanted to add as well then
20 that our position is that certainly even if the bank statement
21 was sent to her with one line referencing a deposit agreement,
22 surely that's not enough to bind her to a contract and wipe
23 away her constitutional right to a jury.

24 THE COURT: And I think that is the crux of the
25 argument.

1 MR. DESPOTAKIS: Well, mutually.

2 THE COURT: I'm sorry?

3 MR. DESPOTAKIS: The bank also waives it. It's a
4 mutual right that was waived. The bank -- it says both the
5 bank and she waive the right to a jury.

6 THE COURT: But we're not contesting -- they're not
7 contesting the bank's waiver, so the only issue we're talking
8 about is her waiver. So let's look at discovery. So the
9 issue of the jury strike shouldn't affect discovery, so I
10 think everybody should move forward with that even while the
11 decision on that issue is pending. So the Rule 26(a)
12 disclosures will be amended and complete by January 23rd.
13 We'll have initial requests February 8th and discovery closing
14 November 9th. So that's a long time on a case that since
15 everybody's got their arms around what the issues are and
16 where the documents may be. Can you tell me why you need that
17 much time to be followed by expert discovery that will take us
18 into 2019? Let's focus first on November 9th. What needs to
19 happen? We are not -- let me just find out from each side
20 what discovery do you need to have done, fact discovery?

21 MR. BROMBERG: Well, Your Honor, the key here really
22 is going to be the degree of the investigation. The
23 interesting quirk here is that we are going to be seeking to
24 look into what Bank of America and Chex Systems have done with
25 this particular type of fraud because as we said before, we

1 had another case involving the same fraud pattern, involving
2 the Barack Obama signatures on the checks. So presumably
3 there's going to be some kind of internal file that's been
4 developed about what the bank has actually done with respect
5 to that particular fraud. But you're absolutely right. Much
6 of the case is going to revolve around what they did with
7 respect to the reinvestigation of our client. But informing
8 them as well is probably the larger fraud file that we presume
9 they have. They haven't told us one way or the other whether
10 they have it, involving what they did with this overall fraud.
11 And now the reason I'm saying this is because my office has
12 had a number of cases involving similar fraud patterns and
13 will settle the case and then six months later there'll be a
14 front page article in the New York Times saying oh wow, the
15 specific fraud pattern that they were trying to blame on our
16 client was actually part of a bigger fraud being engineered
17 from overseas or being engineered by insiders. So presumably,
18 they're doing some kind of investigation into this Barack
19 Obama fraud and how this is going on. We don't know what
20 they're doing. They haven't told us. We want to delve into
21 that and find out what's going here.

22 THE COURT: Okay. So what I'm hearing is that
23 figuring out whether this investigation was reasonable and
24 adequate you're looking to what was done in this case as well
25 as cases like it?

1 MR. BROMBERG: Exactly. Which is part of the reason
2 why we put down so much time because we figured that there
3 would be push back on getting into the larger investigation
4 that's taking place here with respect to this particular
5 Barack Obama facsimile fraud that's going on at Bank of
6 America.

7 THE COURT: Okay. So then let me hear from the
8 defendants what you're intending to do during the time between
9 now and November.

10 MR. DESPOTAKIS: So from the bank's point of view
11 from the discovery [inaudible] we may want to get at her
12 records on her communications or email communications for
13 several months leading up to this and for perhaps the month
14 afterwards. In terms of -- unless something happens or
15 something comes to light in the course of that discovery
16 involving some other party or some other theoretically cohort
17 or co-conspirator if she's involved in it. If not, it is
18 clear that she may very well have given her information,
19 account information to a third party. So I think that will
20 all be generated out of discovery. There will be push back
21 because this is discrete event with this particular customer.
22 Other cases that Mr. Bromberg may have are not on these facts
23 and they certainly have nothing to do with this case,
24 understanding that discovery is not really the issue of
25 relevancy or not. It's useful. That's fine. But there will

1 come a point in time when we'll have a dispute over the
2 discovery and the scope of what we try to get.

3 I learned the other day that one of the two
4 investigators or claim analysts that handled this particular
5 claim is out on maternity leave. I'm waiting for the bank to
6 tell me when she will be back and I will share that
7 information with you when I have it. And it's my
8 understanding also that they may not be physically located in
9 New York at this time so they may have gone for different
10 duties or they may be with the fraud unit in a different
11 physical location in the bank. So I will [inaudible]. We can
12 work out the arrangements for their depositions when they're
13 ready for that.

14 But from the bank's point of view, I don't foresee
15 an extensive amount of discovery of the plaintiff.

16 THE COURT: Okay. And from Chex's perspective?

17 MR. WAIT: I would simply agree with co-counsel.

18 THE COURT: All right. So then let me turn to the
19 expert discovery. What experts do you anticipate?

20 MR. BROMBERG: Well, Your Honor, it would probably
21 be -- we haven't sat down with an expert yet. It would
22 probably be one of the experts who typically testifies in Fair
23 Credit Reporting Act cases to prove up the best practices for
24 an investigation, to prove up causation possibly as to
25 damages. So we may -- we have not yet decided whether or not

1 to bring in an expert. Expert discovery tends to be very
2 expensive. Our preference is really to try and sit down with
3 Your Honor after we've done at least the initial paper
4 discovery and possibly even some of the initial depositions
5 and then sit down for a settlement conference rather than
6 start spending a lot of money on experts which can really
7 drive up the cost of a case. But it would be some of the
8 experts that typically testify in Fair Credit Reporting Act
9 cases. And much of the discovery here is going to be similar
10 to Fair Credit Reporting Act cases except for the fact that
11 we've had this prior pattern and practice and the scope of
12 discovery as to what their investigation file says about this
13 Barack Obama signature scam for want of a better term.

14 THE COURT: All right. And from the defendant's
15 perspective? Experts on your side? Or only rebuttal?

16 MR. DESPOTAKIS: We haven't really approached that
17 issue with our client. It's a little open ended for the
18 moment. I heard what Mr. Bromberg said but this is not a
19 credit case. This is a passing of counterfeit check case.
20 But that's the dispute we probably will have. We'll deal with
21 that. I don't know at this moment. We probably will sit down
22 with our client in the coming month or two to figure out what
23 their intentions are because again, it's expensive. And mind
24 you, Your Honor, this is all over some under -- what is it,
25 not \$5,000 worth of checks.

1 THE COURT: I think that the issue here isn't about
2 the value of the checks but the impact that the plaintiff
3 alleges this had on her life.

4 MR. DESPOTAKIS: I realize that, Your Honor.

5 THE COURT: So that's why it's an important case to
6 her.

7 MR. DESPOTAKIS: And again, I would point out the
8 consequential damages are precluded under the deposit
9 agreement. There are other issues but in the spirit of
10 cooperation, no door is shut here. You know, it will take us
11 a little time to get there. I don't for the moment foresee an
12 expert witness but I do need to talk to my client. We don't
13 want to run down that expense because that would make no sense
14 if this matter can be resolved at some point.

15 THE COURT: Okay. And Chex?

16 MR. WAIT: Chex agrees that after we complete fact
17 discovery it makes sense to engage in some sort of settlement
18 dialogue before we turn to bringing in potential experts.

19 THE COURT: Okay. All right then. So this is what
20 I'll do since it sounds like people are anticipating discovery
21 disputes and not hearing otherwise. I think we should get
22 moving on discovery quickly. It sounds like everybody kind of
23 knows where they're headed, so I think you should start
24 propounding your document requests and interrogatories.
25 You've given yourselves a deadline of February 8th but I would

1 say don't wait. All right? I'm not going to move that
2 deadline up because it's only a month away but I think the
3 faster you can get things done the faster we'll move and the
4 more quickly we can resolve any disputes. So if the document
5 requests are as Mr. Bromberg has represented, I anticipate
6 that there will be push back. And so let's get moving on
7 them, okay, so that you can propound your requests, get your
8 objections in, and then try to work it out. And if you can't
9 work it out, bring it to my attention so that I can resolve it
10 and you can keep going. It sounds like there's room for some
11 discussions and I'm happy to help you out if you need it. And
12 people have all said after the close of fact discovery but I
13 wonder whether there's a point before November when the
14 parties can sit down and try to talk. Yes?

15 MR. BROMBERG: Your Honor, I think maybe after we
16 get through the paper discovery it might make more sense
17 before we start with the depositions because that's really
18 when the when the cost of the case starts skyrocketing is when
19 you start doing the depositions.

20 THE COURT: So let me just look at my calendar and
21 see. Do the parties want a settlement conference? Or I can
22 make a referral to mediation or you can try to work it out on
23 your own.

24 MR. DESPOTAKIS: We would be amenable to a
25 settlement conference.

1 THE COURT: All right. Yes?

2 MR. BROMBERG: We would be amenable to it.

3 MR. WAIT: We're not opposed to a settlement
4 conference. At the same point, it might make sense for the
5 parties to try to -- or for counsel to get together and try to
6 resolve it on their own as a first step.

7 THE COURT: Okay. So here's what I'll do then. I
8 will set a settlement conference for some time in April. All
9 right? Toward the end of April or beginning of May. And that
10 will give the parties a date to work toward so that you can
11 get all the discovery that are really important to you done
12 before that date. And with the eye toward if we can resolve
13 it then you won't have to do the rest of it. And if it's not
14 possible to resolve it at that point, then you can keep going
15 with the next phase and maybe at the end of fact discovery in
16 November we can try again and see where we are. All right?
17 But I think it's useful to have a marker so that you can focus
18 on the discovery you absolutely need before you can sit down
19 and have a reasonable discussion on settlement and then keep
20 the others for later. All right? So and certainly before
21 that date the parties are free to talk amongst yourselves and
22 try to work things out. The Court always appreciates it
23 because I don't have to do anything, I don't have to spend my
24 resources. I'm happy to. But if you can solve it without --
25 resolve the case without my help then that's great. Let me

1 look then at my calendar and see what dates are good. So
2 April I can do -- why don't we go into May. May 1st, May 2nd,
3 May 3rd. Are those dates available?

4 MR. BROMBERG: Are they available to you?

5 MS. WEISSMAN: Fine for me.

6 MR. BROMBERG: They're fine for plaintiffs.

7 MR. DESPOTAKIS: What day of the week are --

8 THE COURT: They're Tuesday, Wednesday, and
9 Thursday.

10 MR. DESPOTAKIS: Any of that is fine, Your Honor.
11 If possible, maybe Tuesday if that's agreeable to everybody?

12 THE COURT: I generally schedule them in the
13 afternoon, so it would be from 2 to 5.

14 MR. DESPOTAKIS: Okay.

15 MR. BROMBERG: That's fine.

16 THE COURT: 2 to 5 on May 1st?

17 MR. BROMBERG: John, is that fine with you?

18 THE COURT: Tuesday is May 1st.

19 MR. WAIT: May 1st?

20 THE COURT: Yes.

21 MR. WAIT: Certainly, Your Honor.

22 THE COURT: Okay.

23 MR. DESPOTAKIS: May 1st, 2 p.m.?

24 THE COURT: Yes.

25 MR. DESPOTAKIS: That's fine, Your Honor.

1 THE COURT: And I would like to get then
2 confidential settlement statements from the parties by April
3 24th.

4 MR. BROMBERG: Ex parte, right?

5 THE COURT: Ex parte. You should email those to
6 chambers. Those will be ex parte and confidential. And after
7 I review them I may give you each a call to discuss them. All
8 right. So for the settlement conference on May 1st I would
9 like the plaintiff obviously to be there and somebody who has
10 settlement authority from each of the defendants. All right?

11 MR. DESPOTAKIS: For the May 1.

12 THE COURT: For May 1st. And if they are not
13 available in person, I would entertain a request that they
14 participate by telephone but you need to tell me why.

15 MR. DESPOTAKIS: In the bank's case, Your Honor, and
16 I'm glad you mentioned that, the decision maker on this on all
17 such settlement conferences is in-house counsel who physically
18 sits in the bank in Rhode Island. He's up in Providence.

19 THE COURT: All right.

20 MR. DESPOTAKIS: That is his role. He supervises
21 in-house counsel on this case for me. So if he can --

22 THE COURT: All right. So he --

23 MR. DESPOTAKIS: -- appear telephonically, that
24 would be --

25 THE COURT: Yes. But he needs to be available for

1 the entire time.

2 MR. DESPOTAKIS: Yes.

3 THE COURT: From 2 to 5.

4 MR. DESPOTAKIS: I'll make that clear to him.

5 THE COURT: All right. Okay. So that's scheduled
6 and I will approve the schedule that you've proposed with the
7 idea that I'm giving you the generous time till November
8 because we're taking a pause in the middle for settlement
9 discussions. And then we'll revisit the expert discovery
10 issue at the end of fact discovery because if you don't need
11 it, then I'll move up that pre-motion date for the dispositive
12 motion. Okay?

13 MR. DESPOTAKIS: Thank you.

14 THE COURT: Great. So I will see everybody on May
15 1st. I will look forward to -- not look forward, but I will
16 anticipate your discovery dispute papers.

17 So let me just tell you little bit about how I want
18 that to go. The request will be propounded. If there are any
19 objections, I mean you should respond. And then if there are
20 issues where there's a motion to compel, first try to talk it
21 through to see if there are things you can work out, narrow
22 the issue, clarify. And if you can't, then file something
23 with the Court telling me what the issues are. So tell me
24 where the point of contention is. Attach the documents as
25 necessary if you think it's important for me to look at it.

1 But you don't need to -- and if there's case law that's
2 relevant, whatever, you can send that to me in a letter motion
3 or letter brief.

4 MR. DESPOTAKIS: Could be letter form?

5 THE COURT: But I don't really need to have a lot of
6 full briefing on the issue because I'm just going to have a
7 telephone conference and I'll discuss it by telephone. If I
8 have questions or I need more research, then I'll give you an
9 opportunity to supplement and give me more. So in the first
10 instance, in other words, I don't need a full blown motion and
11 response. I just need a clear delineation of what you're
12 talking about and any important case law. And then after we
13 talk if I think I need more then I'll ask for more. Okay? So
14 I find that's the easiest way and the fastest way to deal with
15 this.

16 MR. BROMBERG: So basically a letter motion?

17 THE COURT: So a letter motion, but again, as --

18 MR. BROMBERG: Keep it concise.

19 THE COURT: Take the word brief to mean brief, not
20 large.

21 MR. BROMBERG: All right.

22 THE COURT: Okay? So understood?

23 MR. BROMBERG: Mm hm [positive inflection].

24 MR. DESPOTAKIS: Yes, Your Honor.

25 MR. WAIT: Yes, Your Honor.

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1 THE COURT: All right. Thank you very much.

2 MR. DESPOTAKIS: Thank you, Your Honor.

3 MR. BROMBERG: Thank you.

4 (Proceedings concluded at 11:21 a.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 Mary Greco

6 Mary Greco

7 Dated: January 15, 2018

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